

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JASON PINSON,

Defendant-Appellant.

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UNPUBLISHED

May 20, 2003

No. 237767

Wayne Circuit Court

LC No. 00-008962

Before: Cooper, P.J., and Sawyer and Murphy, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree murder, MCL 750.316, possession of a firearm by a felon, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced as a third habitual offender, MCL 769.11, to life in prison on the first-degree murder conviction, three to five years' imprisonment on the felon in possession of a firearm conviction, and two years' imprisonment on the felony-firearm conviction. We affirm.

Defendant first argues that the trial court erred in admitting evidence of a ski mask found in defendant's car. The decision whether to admit evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made. *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000).

Evidence is relevant if it has any tendency to make the existence of a fact which is of consequence to the action more probable or less probable than it would be without the evidence. MRE 401; *People v Crawford*, 458 Mich 376, 388; 582 NW2d 785 (1998). Even if relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence. MRE 403; *People v Taylor*, 252 Mich App 519, 521; 652 NW2d 526 (2002). Unfair prejudice exists when there is a tendency that the evidence

will be given undue or preemptive weight by the jury, or when it would be inequitable to allow use of the evidence. *People v McGuffey*, 251 Mich App 155, 163; 649 NW2d 801 (2002).

The trial court abused its discretion in admitting evidence of the ski mask found in defendant's car. The ski mask was not relevant to the shooting incident at the gas station, nor to the arguments presented by the parties. Moreover, even if the evidence was minimally relevant, any probative value was substantially outweighed by the danger of unfair prejudice and confusion of the issues, where the evidence suggested that defendant was involved in unrelated criminal activity. However, in light of the other evidence presented at trial establishing defendant's guilt, the error was harmless.

An evidentiary error does not merit reversal in a criminal case unless, after an examination of the entire cause, it affirmatively appears that it is more probable than not that the error was prejudicial, or in other words, outcome determinative. MCL 769.26; MCR 2.613(A); *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

Strong evidence existed for the jury to find defendant guilty regardless of the evidence concerning the ski mask. In a statement made to the police a month after the incident, one of the passengers in defendant's car on the evening of the incident stated that the victim, an off-duty police officer, put a gun under her shirt, tucked the gun into her pants, turned around, and walked away from defendant. "Then [defendant] shot once at her, pow." The witness told the police that defendant shot seven more times. The witness further stated that "after [the victim] walked away I thought we were going to smoke a blunt. I didn't feel threatened. She was walking away, he didn't have to shoot her."

Evidence also existed that defendant was outside of his car when the shooting started. In the statement to police, the witness, referenced above, said, "[defendant] should not have even taken it that far. [Defendant] took it to a whole new level. [The victim] was walkin' away. He knew she was a cop, she tried to reason with [defendant], she had put her gun away, and we thought it was over."

Another passenger in defendant's car made a statement to the police that defendant raised his gun, and then the victim shot her gun. He further testified that the victim was walking away, and only turned around because defendant stood up and got out of the car, and raised a gun.<sup>1</sup> Additionally, another witness testified that she never saw the victim pull out her gun, nor did she ever see the gun exposed. Another witness testified that after defendant started shooting, the victim pulled her gun out, but the witness did not see her fire the gun. Therefore, we conclude that, although the trial court erred in admitting evidence of the ski mask, it was not outcome determinative, and does not require reversal.

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<sup>1</sup> We note that the passengers in defendant's vehicle testified at trial in a manner favorable to defendant and inconsistent with their original statements to police.

Defendant next argues that the trial court erred in refusing to grant a mistrial after the prosecutor referenced a polygraph test in questioning a witness for the prosecution. We disagree. A request for a mistrial is reviewed under an abuse of discretion standard. *People v Nash*, 244 Mich App 93, 96; 625 NW2d 87 (2000).

The prosecutor asked the witness if he talked to a police officer on August 23, 2000, and the witness could not recall doing so. Then the prosecutor asked the witness if he went for a polygraph, and the witness responded affirmatively. At this point, defendant objected to the questioning. The prosecutor responded, arguing that he would not go into the polygraph examination, and that he would not ask about the results. Rather, he would ask the witness if he talked to an officer at the polygraph examination, and if he made a statement.

The trial court denied defendant's motion for a mistrial, and gave the jury a cautionary instruction not to draw any inferences from the polygraph reference. Normally, a reference to a polygraph test is not admissible before a jury. *Nash, supra* at 97. It is a bright-line rule that reference to taking or passing a polygraph test is error. *Id.* Although reference to a polygraph test is inadmissible, it does not always constitute error requiring reversal. *Id.* at 98. To determine if reversal is required, this Court must analyze a number of factors including:

(1) whether defendant objected and/or sought a cautionary instruction; (2) whether the reference was inadvertent; (3) whether there were repeated references; (4) whether the reference was an attempt to bolster a witness's credibility; and (5) whether the results of the test were admitted rather than merely the fact that a test had been conducted. [*Id.*, quoting *People v Kiczenski*, 118 Mich App 341, 346-347; 324 NW2d 614 (1982).]

First, defendant did object and the trial court gave a cautionary instruction to the jury. Second, although the reference was intentional, the prosecutor did not ask about the results of the polygraph, but rather asked the witness whether he made a statement to an officer when going to the polygraph examination. Third, there were not repeated references, only an isolated incident. Fourth, this was not an attempt to bolster the witness' credibility. Fifth, the results of the test were not admitted nor was evidence that a polygraph test was actually conducted. We conclude that the reference to a polygraph test did not prejudice defendant, and the trial court did not abuse its discretion in denying defendant's request for a mistrial.

Defendant next argues that the prosecutor engaged in improper conduct that denied defendant a fair trial. Generally, a claim of prosecutorial misconduct is reviewed de novo. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). Unpreserved issues are reviewed for plain error which affected substantial rights. *People v Rodriguez*, 251 Mich App 10, 32; 650 NW2d 96 (2002). No error requiring reversal will be found in cases involving prosecutorial misconduct unless the prejudicial effect of the improper remarks could not have been cured by an appropriate instruction. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). The test of prosecutorial misconduct is whether defendant was denied a fair and impartial trial. *Id.* Prosecutorial misconduct issues are decided on a case-by-case basis, and this

Court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999).

Defendant argues that the prosecutor committed misconduct when he raised the innuendo that defendant and his companions were committing robberies because the ski mask was found in defendant's car. Although evidence of the ski mask was not relevant, a finding of misconduct may not be predicated on a prosecutor's good-faith effort to admit evidence, *Noble, supra* at 660, and here the trial court agreed with the prosecutor that the evidence and questioning was proper. Regardless, for the reasons stated above, defendant was not denied a fair and impartial trial because the error was not outcome determinative.

Defendant next argues that the prosecutor committed misconduct by referencing a polygraph examination. We find no bad faith on the part of the prosecutor, where he was simply attempting to elicit a statement made by the witness. Moreover, defendant was not prejudiced by the reference; he was not denied a fair and impartial trial.

The remainder of defendant's allegations of prosecutorial misconduct were not preserved for appeal, and are thus subject to plain error review. *Rodriguez, supra* at 32.

Defendant argues that the prosecutor disparaged a witness' testimony when he said that he believed the witness was high. Although this was an inappropriate choice of words, when viewing the prosecutor's remarks in context, the prosecutor was merely arguing that the witness' testimony made no sense and could not be believed in light of other testimony. A prosecutor may argue from the facts that a witness is not worthy of belief, and he or she is not required to state inferences and conclusions in the blandest possible terms. *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996). We find that defendant failed to show that the prosecutor's comments resulted in plain error affecting defendant's substantial rights.

Defendant next argues that the prosecutor committed misconduct when he stated that defendant intended to kill the victim, thereby injecting the prosecutor's personal beliefs. A prosecutor is free to argue evidence and all reasonable inferences arising from it as they relate to his theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Here, the prosecutor was not stating his personal beliefs, but rather, was arguing the evidence and all reasonable inferences, which showed that defendant intended to kill the victim. There was no plain error affecting defendant's substantial rights.

Defendant next argues that the prosecutor improperly stated:

Ladies and gentlemen, attorneys call witnesses for various reasons. Some are strategy, some are because we believe that people are going to lie. I would never put a witness on that I believe is going to lie.

However, upon review of the record, we find that the prosecutor made that statement in response to a statement by defense counsel that the prosecutor did not call a particular witness. Otherwise improper prosecutorial remarks generally do not require reversal if they are responsive to issues

and arguments raised by defense counsel. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). The prosecutor was responding to defense counsel's remarks and explaining why he did not produce the witness. To the extent that the prosecutor's statements constituted improper vouching, we find no plain error affecting defendant's substantial rights.

Defendant further argues that the prosecutor's argument that the jury should not get caught in smoke and mirrors, was a personal attack on defense counsel. A prosecutor may not personally attack the credibility of defense counsel, *People v Kennebrew*, 220 Mich App 601, 607; 560 NW2d 354 (1996), or suggest that defense counsel is intentionally attempting to mislead the jury, *Watson, supra* at 592. Reviewing the record as a whole, the prosecutor was attempting to get the jury to focus on the facts of the case, and he was not attacking defense counsel. We find no plain error affecting defendant's substantial rights.

Defendant also argues that the prosecutor committed misconduct when he stated:

And I submit to you, ladies and gentlemen, it's not because I want to win. I have no desires. I have no gun belt with a notch in it, or notches. Wins and losses don't affect who I am. I'm here for justice. I'm here to present the evidence and for you to make the decision.

However, this too was made in response to defense counsel's statement, which was as follows:

Let me suggest to you, it's not a question of whether or not, indeed, Mr. Wagner prevails and wins. Let me submit to you, it's not a question of whether or not Mr. Pitts wins. . . . Let me suggest to you, it's what you want, because we all win when justice is done.

Defense counsel also inferred that the prosecutor was asking for victory at any cost. The prosecutor's statement in response to defense counsel's remarks was not improper and did not amount to plain error.

Defendant next argues that the prosecutor appealed to the jury's sympathy when discussing the fact that the victim's life was over, that defendant's life continued, and that this matter was not a theatrical performance. Once again, the prosecutor's remarks were in direct response to defense counsel's statements that referenced the case as if it were a play or theatrical drama. We conclude that the prosecutor's remarks were made in response to defense counsel's statements, and were not made to arouse juror sympathy. Defendant fails to show plain error.

Turning away from the allegations of prosecutorial misconduct, defendant next argues that the trial court erred in allowing a prosecution witness to testify in jail garb. We disagree. The trial court found that the witness was a prosecution witness and there was no undue or unfair prejudice arising out of the fact that he was in jail clothing. We agree. Defendant fails to show how the witness' attire prejudiced him. The witness was called on behalf of the prosecution, and stated that he was in prison on an unrelated case. The trial court did not abuse its discretion in allowing the witness to testify or in denying a motion for mistrial regarding the matter.

Finally, defendant argues that cumulative error denied his right to a fair trial. We disagree. This Court reviews this issue to determine if the combination of alleged errors denied defendant a fair trial. *People v Knapp*, 244 Mich App 361, 387; 624 NW2d 227 (2001). In order to reverse on the grounds of cumulative error, the errors at issue must be of consequence. *Id.* at 388. The effect of the errors must have been seriously prejudicial in order to warrant a finding that defendant was denied a fair trial. *Id.* Here, we find that although some errors occurred, they were not of consequence, individually or collectively, and defendant was not denied his right to a fair trial.

Affirmed.

/s/ Jessica R. Cooper  
/s/ David H. Sawyer  
/s/ William B. Murphy